

Editor's note: 91 I.D. 212; Appealed -- aff'd, Civ.No. 85-646-LE (D.Or. July 9, 1987), 676 F. Supp. 1047; aff'd in part, rev'd in part, remanded, No. 87-4096 (9th Cir., June 7, 1989 as amended June 30 and July 31, 1989); 876 F.2d 1419

STATE OF OREGON ET AL., II

IBLA 73-363

Decided May 10, 1984

Appeals from a decision of the Oregon State Office, Bureau of Land Management, rejecting applications for school indemnity lands. OR 3162, OR 3163, OR 3164, and OR 3737.

Affirmed in part; reversed in part and remanded.

1. Act of February 14, 1859--Act of February 28, 1891-- Lieu Selections--School Lands: Indemnity Selections-- State Grants--State Lands--State Selections--Surveys of Public Lands: Generally

Where the State of Oregon has selected indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed township in the Siskiyou National Forest and thereafter a reprotraction or survey is run revealing new fractional townships within the area originally protracted, the State is entitled to indemnity lands for those new townships in accordance with the compact it entered with the United States by Act of Feb. 14, 1859.

2. Act of February 28, 1891--Lieu Selections--School Lands: Indemnity Selections--State Selections--Surveys of the Public Lands: Generally

A state selecting indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for unsurveyed school sections within a national forest shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of secs. 16 and 36 therein. Where a protraction on which the state

relies to make its indemnity selections reveals that a fractional township is present, the state's entitlement to indemnity lands is calculated according to the pro rata rule set forth at 43 U.S.C. § 852 (1976).

Where a survey on which the state relies to make its indemnity selections pursuant to the Act of Feb. 28, 1891, reveals a fractional township with a school section in place, the state's entitlement should be in an amount equal to the acreage shown by the surveyed school section or in an amount determined by the pro rata rule at the election of the state.

3. Act of February 28, 1891--Lieu Selections--School Lands: Indemnity Selections--State Selections--Surveys of Public Lands: Generally

Until a survey of public lands has been run and approved, the designated sections of a township are undefined and the lands are unidentified.

4. Act of February 28, 1891--Lieu Selections--School Lands: Indemnity Selections--State Selections

Where the State of Oregon makes an initial selection of indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed fractional township in a national forest, it is not entitled to additional indemnity lands should a subsequent reprotraction or survey be made of the township.

APPEARANCES: Michael D. Reynolds, Esq., and Peter S. Herman, Esq., Department of Justice, State of Oregon, Salem, Oregon; Robert H. Memovich, Esq., Joseph B. Brooks, Esq., Donald P. Lawton, Esq., and Eugene A. Briggs, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon; Donald H. Coulter, Esq., Grants Pass, Oregon, for Crater Title Insurance Company and Transamerica Title Insurance Company of Oregon; Alfred H. Hampson, Esq., Portland, Oregon, for Karl P. Baldwin and Barbara S. Baldwin, executrix.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

In State of Oregon I, 78 IBLA 255, 91 I.D. 14 (1984), this Board determined to bifurcate the State's appeal of a decision by the Oregon State Director, Bureau of Land Management (BLM), dated April 12, 1973, and in this way address in separate decisions two highly complex issues. These issues, succinctly stated, involve protractions of public land surveys and forest lieu selections. State of Oregon I addressed the question of forest lieu selections. This decision will address the remaining issue, protractions.

The State Director's decision of April 12, 1973, held that for a number of reasons the State of Oregon had exceeded its entitlement to make any further selections of land as indemnity for school lands which had been lost to the State. Three principal categories of improper base lands used by the State in its past indemnity transactions were set out in the decision, only one of which need concern us in this portion of the appeal: lands described by certain township designations shown on existing surveys but previously described by different township designations on prior protractions.

In order to understand why BLM held that the State had exceeded its entitlement to make further selections of land as indemnity for school sections lost to the State, it is necessary to set forth the relevant statutes. Oregon was admitted to the Union by Act of Congress approved February 14, 1859, ch. 33, 11 Stat. 383. Section 4 of the Admission Act provided, in material part, as follows:

That the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. [Emphasis added.]

Recognizing that secs. 16 and 36 might be unavailable or lost to a state for a number of reasons, Congress enacted several statutes providing for selections of other public lands in lieu of those lost to the state. The Act of February 26, 1859, ch. 58, 11 Stat. 385, provided for the appropriation of lands of like quantity where secs. 16 or 36 may have been patented by preemptors. That Act, codified in substantial part as Revised Statute 2275, 2d ed. (1878), further provided for appropriations "to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever." In 1891, 1958, and 1966, Revised Statute 2275 was amended 1/ to read as presently codified at 43 U.S.C. § 851 (1976):

And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: Provided, That the selection of any lands under this section in lieu of sections granted or reserved to a State

1/ Act of Feb. 28, 1891, ch. 384, 26 Stat. 796. Act of Aug. 27, 1958, P.L. 85-771, § 1, 72 Stat. 928. Act of June 24, 1966, P.L. 89-470, § 1, 80 Stat. 220.

shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

The Secretary of the Interior's duty to determine by protraction or otherwise the number of townships affected by a reservation was made clear:

And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: Provided, however, That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

43 U.S.C. § 851 (1976).

The Act of February 26, 1859, supra, also alluded to certain arithmetic principles of adjustment set forth in the Act of May 20, 1826, ch. 83, 4 Stat. 179, to compute the quantity of land which the State could select as compensation for fractional or wanting secs. 16 or 36. 2/ These principles

2/ The legislative history for the Act of May 20, 1826, indicates that the purpose of the Act was to compensate townships situated on navigable rivers where sec. 16 was cut off by a bend or turn in the river. A second purpose of the Act was to compensate those townships in which Congress had failed to reserve a school section. Among these was a township of land granted to General Lafayette, the inhabitants of which were without any provision for the support of schools. Register of Debates in Congress at p. 2575 (1826).

of adjustment were codified in Revised Statute 2276 3/ and are referred to as the "pro rata rule" by the parties. The principles of adjustment set forth in Revised Statute 2276 were carried over in material part by the amendments of 1891, 1958, and 1966. Revised Statute 2276, as amended, 43 U.S.C. § 852(b) (1976), now provides:

Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land: Provided, That the States which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

A. Siskiyou National Forest

A protraction is an extension of a cadastral survey for the purpose of describing unsurveyed land. In the Siskiyou National Forest, established by Theodore Roosevelt in 1906, 34 Stat. 3239, protractions were made by the

3/ Revised Statute 2276 provided:

"The lands appropriated by the preceding section shall be selected * * * in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half, of a township, one-half section; and for a fractional township, containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one quarter-section of land."

United States in mapping the area within forest boundaries. Because these lands had been reserved by Presidential proclamation prior to their vesting in the State, 4/ the State of Oregon took indemnity lands for the school sections lost to it. The State's entitlement was determined by Government protractions. In 1927, some years after Oregon received its entitlement, the United States surveyed part of the forest and later reprotracted other parts. 5/ This survey and reprotraction resulted in the General Land Office (GLO) recognizing "new" (i.e., additional) fractional townships, each greater than one section, but less than one-quarter township, in size. 6/ In 1961, BLM granted to the State 320 acres as indemnity for each of two new fractional townships revealed by the 1927 survey. No indemnity lands were received for other new fractional townships which were shown by the reprotraction.

The State of Oregon maintains that it is entitled to indemnity lands for the school sections (16 and 36) lost to it in these new fractional

4/ Vesting is explained by the United States Supreme Court in this way:

"After reviewing the cases, Secretary Lamar concluded (December 6, 1887; to Stockslager, Commissioner, 6 L.D. 412, 417) that the school grant 'does not take effect until after survey, and if at the date the specific sections are in a condition to pass by the grant, the absolute fee to said sections immediately vests in the State, and if at that date said sections have been sold or disposed of, the State takes indemnity therefor.'" United States v. Morrison, 240 U.S. 192, 207 (1916). The reservation of a school section for forest purposes is considered a disposal of the school section in this context. See 43 U.S.C. § 851 (1976).

5/ Tps. 34 and 35 S., Rs. 10 and 11 W., Willamette meridian, as shown on the original Government protraction, were surveyed by the General Land Office in 1927. In 1942, the Forest Service reprotracted the land previously identified as Tps. 37 and 38 S., Rs. 11 and 12 W. BLM in 1966 reprotracted lands previously identified as Tps. 36 and 37 S., R. 12 W.

6/ Although it is convenient to use the phrase "new townships," we do so with the understanding that the lands therein are in no way new lands. These lands were always within the forest boundaries and were included in the original Government protraction, albeit under a different township designation.

townships in the Siskiyou National Forest. Oregon further maintains that the amount of its entitlement is equal to the acreage of the school sections in place, if that amount exceeds the amount established by the so-called "pro rata rule," quoted above as Revised Statute 2276, 43 U.S.C. § 852 (1976).

In response, BLM maintains that Oregon waived its rights to indemnity for secs. 16 and 36 in the new townships by selecting lands in lieu thereof prior to the 1927 survey. BLM calls our attention to 43 U.S.C. § 851 (1976) in support of its argument in favor of waiver. The relevant portion of this statute states:

And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: Provided, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. [Emphasis added.]

Oregon rests its claim for indemnity upon the Act of February 14, 1859, quoted above in part, admitting Oregon to the Union. The key language in this Act, the State contends, is the phrase granting to the State secs. 16 and 36 in every township or other lands equivalent thereto if such sections have been sold or otherwise disposed of. Oregon refers to this statute as its compact with the United States and, accordingly, bases much of its argument in contract.

Although the parties have not cited any case law directly on point, this Department has decided a similar issue in at least three instances. In

State of Wyoming, 9 IBLA 22, 80 I.D. 1 (1973), Wyoming took indemnity lands using as base certain surveyed and unsurveyed sections. Thereafter, these sections were either resurveyed, initially surveyed, or re-platted by projection diagram and found to contain more than 640 acres each. Wyoming then made application to select additional lieu lands using the overage as base. BLM rejected the State's application and this Board affirmed.

Our decision in State of Wyoming, *supra*, relied upon two prior cases, each involving lands in New Mexico. These decisions, we said, established the rule that the extent of a state's right to receive a school indemnity grant is limited to the acreage shown by the official surveys (or protraction diagrams for unsurveyed lands), and where indemnity lands have been granted by the United States in lieu thereof, subsequent discovery of deficiencies in acreage caused by inaccuracies in the surveys will not afford a new basis for adjustment of the grant. Therein, we quoted from State of New Mexico, 51 L.D. 409 (1926), a case involving a selection based upon an erroneous original survey:

In denying the State's claim for credit on account of the alleged deficiency, the Commissioner held that Section 2396, Revised Statutes, contemplated that in the disposal of public lands the official surveys are to govern, and that each section or sectional subdivision, the contents whereof have been returned by the surveyor general shall be held as containing the exact quantity expressed in the return that the design and purpose of this statute was to establish beyond dispute all lines and monuments of accepted official surveys; to obviate inquiry and contention with respect to survey inaccuracies and place a statutory bar against attempts to alter the same or to set up complaints of deficiency of areas as a basis for resurvey. The Commissioner observed that aside from this statutory limitation, administrative reasons precluded the granting of the State's claim; that the stability of surveys and the title to lands described by reference thereto should be unassailable by parties finding differences in measurements and areas from those returned, and if

transactions involving the disposition of public lands were not made final, and the Government was obliged to open up for readjudication the question as to the area of a particular tract or tracts granted and patented, controversies would be constantly arising and resurveys and readjudications would be interminable. (Ibid. at 411).

* * * * *

The Department has carefully considered the matter and finds no reason to differ with the conclusion reached by the Commissioner. The provisions of section 2396, Revised Statutes, recognize the fact taught by experience that measurements of lands can not be performed with precise accuracy and that the work of no two surveyors would exactly agree. True, the alleged shortage in this case looms to a figure of impressive proportions, but the very purpose of the declaration of law above referred to was to obviate inquiry and contention in regard to survey inaccuracies. Moreover, the recognition of right to an adjustment in this instance would establish a far-reaching precedent and afford a basis for similar claims by other States, and a multitude of claims by individuals who had purchased Government lands and found the area short of that expressed on the plat of survey. Also, the rule works both ways, in favor of and against the United States. Manifestly the Government has no basis for claim to readjustment of boundaries or for further payment, or for restitution in those cases of certified or patented lands where there was an excess of acreage over that paid for or taken in harmony with the survey returns at the time of disposal. And if the returns are conclusive against the Government they must also be conclusive in its favor. Take the present case; the Government can not inquire into the contents of the school sections and subdivisions assigned by the State as basis for its indemnity selections, but accepts them as containing the exact quantity expressed in the return. Examination might disclose a deficiency in the area of these sections; frequently, no doubt, exchanges have been made of unequal areas, the discrepancy being in favor of the State, but the law gives these transactions repose and they can not be disturbed. Otherwise endless confusion would ensue. (Ibid. at 412).

The same principle was applied in the 1930 decision, State of New Mexico, 53 I.D. 222, where it was held:

Where a State submits as base for an indemnity school selection an unsurveyed section within a national forest the area of which was estimated by protraction, the adjudication of its claim for indemnity on that basis is final and the State will be estopped

from asserting a claim for further indemnity on the ground that the section when surveyed was shown to contain a greater area than that estimated by the protraction. (Syllabus).

In the instant appeal, we note that there exists a factor not present in State of Wyoming or the two State of New Mexico cases. After Oregon received its indemnity based on original Government protractions, new townships were recognized by the 1927 Government survey and by the Government reprotractions of 1942 and 1966. Recognition of these new townships was caused by GLO's finding that oversized townships existed in Ranges 11 and 12 West (Stipulation at 11, Aug. 23, 1976). 7/ Although we are mindful of the practical difficulties that recognition of new entitlement occasions to BLM, we hold that the State is entitled to indemnity for school sections lost to it within these new townships. 8/

[1] Our holding in this respect is based upon the Act of February 14, 1859, quoted above in part, wherein the United States offered to the people of Oregon various propositions, the first of which provided that secs. 16 and 36 in every township of public lands in the State, or other lands equivalent thereto where either of said sections, or any part thereof, has been sold or otherwise disposed of, shall be granted to the State for the use of schools. This Act further provided that the grant of school lands is offered

7/ The current Manual of Surveying Instructions (1973 ed.) addresses the question of when BLM should create half-township or half-range numbers. At page 84, the Manual states:

"3-83. When the length or width of a township exceeds 480 chains to such an extent as to require two or more tiers of lots adjoining the north or west boundary, the usual past practice has been to lot all of the area beyond the regular legal subdivisions. * * * In modern practice, sections in excess of 120 chains are avoided by the creation of half-townships of half-range numbers."

8/ These new townships are: Tps. 34 and 35 S., R. 10-1/2 W.; T. 37-1/2 S., Rs. 11 and 12 W.; and Tps. 36 and 37 S., R. 12-1/2 W.

on the condition, inter alia, that the people of Oregon shall provide by ordinance that the State will never interfere with the primary disposal of the soil within the State by the United States. A sixth proposition in the Act provided that the State shall never tax the lands or property of the United States in the State. The propositions of this Enabling Act were accepted by the legislative assembly of the State of Oregon on June 3, 1859. 1 Lord's Oregon Laws, at 28, 29; United States v. Morrison, supra.

Case law supports the contention of counsel for the State that this Enabling Act represents a compact between two sovereigns. In Andrus v. Utah, 446 U.S. 500, 507 (1980), the Supreme Court agreed with the State of Utah that its school land grant was a "solemn agreement" that in some ways may be analogized to a contract between private parties. The United States agreed to cede some of its land to the State, Mr. Justice Stevens explained, in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry. The dissent in Andrus v. Utah refers to the school land grant as a compact that Congress has respected and enforced throughout the Nation's history. 446 U.S. at 520-21. See also Beecher v. Wetherby, 95 U.S. 517, 523 (1877); and Cooper v. Roberts, 59 U.S. (18 How.) 173 (1855).

When new townships were recognized by the 1927 survey and the reprotractions of 1942 and 1966, the State was entitled to receive indemnity for the school sections therein, notwithstanding the waiver provisions of 43 U.S.C. § 851 (1976). By that provision, a state selecting indemnity for school lands lost to it within a particular township waives its right to the school lands in that particular township. If a township is oversized to such

an extent that GLO, following selection, recognizes a new township, in addition to earlier protracted townships, occupying land formerly within the perimeter of such earlier townships, we hold that no waiver has occurred as to those school lands within the new township.

We acknowledge that the issue of waiver in this case poses a difficult question. Our resolution of this issue, however, is guided by a well-established policy of the Supreme Court that the legislation of Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively. Wyoming v. United States, 255 U.S. 489, 508 (1921), and cases cited therein.

In holding that the State is entitled to receive indemnity for the school sections lost to it in these newly recognized townships, we must distinguish prior Departmental precedents such as State of Wyoming and the two State of New Mexico cases, discussed above. GLO's error in the instant appeal was its failure to carry out that provision of the Act of February 28, 1891, supra, requiring the Secretary, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that were included within the Siskiyou National Forest. 43 U.S.C. § 851 (1976). GLO underestimated this number to the State's detriment. No such error occurred in any prior Departmental case cited to this Board.

[2] Although we agree with the State that it is entitled to indemnity for school lands lost to it within the newly recognized townships, we disagree with the State's method of calculating the amount of this indemnity. The

State contends that it is entitled to the acreage shown on Government reprotraction diagrams of reserved school sections or, in the alternative, to the acreage determined by the pro rata rule, 43 U.S.C. § 852 (1976). Under well-established principles, until a survey is run and approved, the designated sections of a township are undefined and the lands are unindented. United States v. Morrison, *supra*. A survey of public lands does not ascertain boundaries; it creates them. Cox v. Hart, 260 U.S. 427, 436 (1922). Absent a survey, any argument by the State calling for indemnity lands equal in acreage to a protracted school section must overcome these well-settled principles.

There is no denying that GLO frequently inserted acreage estimates on school sections within a protracted township. These acreage figures, however, have no legal significance for entitlement purposes in the absence of a survey of the township. The Act of February 28, 1891, *supra*, carefully limits the purpose for which a protraction diagram may be used. Therein, a protraction is first authorized to enable the Secretary to ascertain and determine the number of townships that will be included within a reservation. Prior to the Act, no indemnity could be selected for unsurveyed lands within a reservation. State of California, 6 L.D. 824 (1888).

The purpose of the Act and the Department's concern for the accuracy of a protraction are set forth in a letter from Commissioner Groff forming part of the legislative history of the Act of February 28, 1891:

Under the law as construed by the Department the State or Territory is entitled in such case to indemnity for lands granted

for schools in sections 16 and 36, embraced in permanent reservations and the purpose of the proposed legislation is to enable the proper selection of indemnity to be made at once, while good lands can be found for selections before the time, more or less distant, when actual surveys of the reservations will be made, and when it is a matter of course that the good lands will be generally appropriated for other purposes under existing laws.

I am of opinion that the amount due to the schools as indemnity under the general principles of the bill may be ascertained with sufficient accuracy in the way contemplated in the proposed amendment, and I see no good reason why it should not be adopted.

22 Cong. Rec. 3466 (1891).

It is important to emphasize that the 1891 amendments to Revised Statute 2275, by their express terms, authorized protraction only for the purpose of ascertaining the number of townships in reserved lands. Only after the number of townships was initially determined would it be possible for a state to seek indemnity on a "section for section" basis as provided in the Act. ^{9/} The implicit presumption animating the Act was that, having determined the existence of a full township by protraction, each section therein would necessarily consist of 640 acres, and, thus, the right of a state to indemnity for such a protracted township would total 640, 1,280, or 2,560 acres depending upon the number of school sections granted to the state in its Admission Act. Indeed, no other approach is logically consistent with established principles of survey.

^{9/} The term "section for section" was added to 43 U.S.C. § 851 by the 1958 amendments. As originally enacted, the language provided that the state or territory would be entitled to "select indemnity lands to the extent of two sections for each of said townships." To the extent that this statutory language could be seen as constituting an upwards limit on a state's entitlement, i.e., two sections or 1,280 acres, the original language can be seen as reinforcing our interpretation of the intent of Congress herein.

Since, as noted above, a survey of public lands actually creates rather than merely identifies each section within a township, the actual acreage of any section of a protracted township is, in law and in fact, indeterminate until an actual survey has been completed, as the section does not exist until such time. Thus, no acreage figures can be ascribed to specific sections of that township which might serve as an independent basis for state selection. ^{10/} It similarly follows that where a protraction reveals the existence of a fractional township within a reserved area, the state's right to indemnity is ascertainable only by reference to the procedures enunciated in Revised Statute 2276.

Candor requires us to admit that these principles have not always been clearly delineated in past Departmental decisions. Thus, in State of Wyoming, supra, we noted that in certain situations the area offered as base "was one unsurveyed section, presumably 640 acres." Id. at 23, 80 I.D. at 1. Technically, we should have stated that the section was "presumptively" 640 acres. Subsequently, while the principle of law was correctly stated, we implied that a state was bound by the acreage totals estimated to exist within a state school section by the protracted survey in effect at the time the state offered the land as base for an indemnity selection. While it is true, as we reaffirm herein, that a state is bound by the acreage "presumptively" deemed to exist

^{10/} The Department does, of course, use estimated acreage in sections of protracted townships as a means for estimating rentals for oil and gas and other mineral leases. This, however, is done merely as a convenient tool which benefits both parties, and it must be noted that such leases in no way qualify the United States' ownership of the underlying fee. Where, however, any party seeks to acquire title to land in a protracted township, such title can only be based on an actual survey. Clearly, the grant of indemnity on the basis of such a section in a protracted township is more akin to the patenting of the land than the mere issuance of an oil and gas lease.

as the result of a protraction of a township, 11/ this statement could be misread as implying that specific acreage estimates of sections which are often inserted in a protraction diagram may serve as the basis for acquiring indemnity on an acre for acre basis. This is not the case. 12/

Admittedly, the effect of the presumption that every section in an unsurveyed protracted full township contains 640 acres is to limit a state's right to indemnity when taken on the basis of a protracted township to a maximum of 640 acres per school section, and, thus, in certain circumstances a state may not obtain the greater acreage which a survey on the ground would disclose. Certain observations, however, are in order.

First, a state is not required to base its selection on a protraction, but can, if it chooses, decide to await actual survey of the land and, should the survey disclose an excess of 640 acres within a state school section, obtain indemnity based on the actual acreage in place.

11/ While in a protracted full township each section would presumptively be deemed 640 acres, where a fractional township existed school section acreage which would be presumed to be present would be ascertained by reference to Revised Statute 2276.

12/ Similarly, in State of New Mexico, 53 I.D. 222, the decision noted that sec. 2 was shown by protraction "as having an estimated area of 640 acres." While this statement also raises the spectre that an acreage total is ascertainable for specific sections, we think this case is more properly seen as following the general rule enunciated in the text. Indeed, inasmuch as sec. 2 is a northern tier section, it is highly unlikely that a survey would return the section as embracing exactly 640 acres, since survey excesses and deficiencies are generally offset on the northern and western boundaries of a township. Rather, the use of the phrase "having an estimated area of 640 acres" is more consistent with our stated holding that where a protraction indicates that a full township exists, each section within that township is presumptively 640 acres.

Second, while the limitation of 640 acres per section for every protacted full township may, at times, work to the state's detriment, application of the pro rata rule for fractional townships set forth in Revised Statute 2276 will always work to the state's benefit. Where the fractional township is surveyed, the state has the option of taking its place grant or taking according to the pro rata rule, whichever avenue benefits the state more. And while we hold that the state must, as a matter of law, use the principles of adjustment where the fractional township is unsurveyed, these principles generally work to the state's benefit, since the pro rata rule rounds up, and normally serve to increase the state's grant.

Finally, it must be noted that there will be situations in which a subsequent survey will disclose that, contrary to the protraction under which a state took indemnity, less land was actually in existence in the granted section than had been presumed on the basis of the protraction diagram. Where this occurs, however, the state is not required to make good on the base which it tendered. Rather, it receives the benefit of the Department's error without need to make recompense. There is, in short, a mutuality of benefit and risk in this procedure which justifies the invocation of repose for any transactions predicated thereon.

These considerations animated not only the two decisions in State of New Mexico, supra, but were also the predicate of the Departmental decisions in State of New Mexico, 54 I.D. 159 (1933) 13/ and State of California,

13/ In this case, BLM estimated the acreage of a fractional township, most of which was unsurveyed land within the Lincoln National Forest. Township acreage was said to be in excess of 17,280 acres, i.e., greater than three-quarters of a township in size. BLM granted to the State four sections of indemnity

20 L.D. 103 (1895), which considered the practice of using a protraction to determine the number of townships to the nearest quarter township, within a reservation. While there may have been isolated instances in which these principles seem to have been ignored, such aberrations would not justify this Board's failure to follow the general rule as delineated in this decision.

In the instant case, the new townships recognized by the 1927 survey and the reprotractions of 1942 and 1966 are fractional townships, each greater than one section, but less than one-quarter township, in size. If, as the record shows (Stipulation at 12), the State is unwilling to await the extinguishment of the reservation currently affecting the new, unsurveyed, fractional T. 37-1/2 S., Rs. 11 and 12 W., and Tps. 36 and 37 S., R. 12-1/2 W., an option expressly offered to the State by 43 U.S.C. § 851 (1976), the measure of its indemnity, i.e., section for section, is calculated in accordance with the pro rata rule of 43 U.S.C. § 852 (1976). See State of New Mexico, 54 I.D. 159 (1933). For each new, unsurveyed, fractional township within the reservation, the State is entitled to a total of 320 acres of indemnity lands.

For Tps. 34 and 35 S., R. 10-1/2 W., each a new, surveyed, fractional township showing school sections in place within the reservation, the State's entitlement should be in an amount equal to the acreage shown by the surveyed

fn. 13 (continued)

lands, consistent with the State's school grant of secs. 2, 16, 32, and 36 in every township. Act of June 20, 1910, ch. 310, 36 Stat. 557, 561.

This case also expressly overruled a case, State of New Mexico, 49 L.D. 314 (1922), relied upon by the State of Oregon for its position that "protractions are the appropriate means of determining the quantity of school lands within withdrawn townships in order that the State may select 'lands of equal acreage' to those lost in place" (State's Reply Brief at 11 (May 1, 1978)).

school section(s) or in an amount determined by the pro rata rule at the election of the State. The State's receipt of 320 acres in 1961 for each of these surveyed, fractional townships shall not preclude it from receiving its full entitlement. Any future indemnity granted according to the provisions of this paragraph shall, however, reflect the State's receipt of 640 acres in 1961.

B. Umpqua National Forest

Lands within the Umpqua National Forest appear on a diagram forming part of the Presidential proclamation of January 25, 1907, 34 Stat. 3270, enlarging the boundaries of the Cascade Range Forest Reserve. Prior to 1920 and at a time when the lands were unsurveyed, the State of Oregon took indemnity for 28 sections contained in Tps. 25 and 26 S., Rs. 1 through 6, 6-1/2 E., Willamette meridian. Subsequent surveys (1929-33) and reprotractions (1942, 1966) revealed the existence of additional fractional townships, each greater than one section, but less than one-quarter township, in size. In 1961, the State selected and received 320 acres for each of three new, surveyed, fractional townships in T. 25-1/2 S., Rs. 1 through 3 E. No indemnity was received for other new, fractional townships. ^{14/}

Principles similar to those set forth in our discussion of the Siskiyou National Forest apply. Because the grant of school lands set forth in the Oregon Enabling Act is in the nature of a compact and has historically been given a liberal, rather than restrictive construction, we hold that the State

^{14/} These other new fractional townships are described in the stipulation at pages 19-20: T. 25-1/2 S., Rs. 4 and 5 E.; and T. 25-1/2 S., Rs. 6 and 6-1/2 E.

is entitled to indemnity lands for those new fractional townships first recognized in the surveys of 1929-33 and the reprotractions of 1942 and 1966. As before, though we agree with the State that it is entitled to indemnity, we disagree with its computation of the amount of that entitlement.

If, as appears from the record (Stipulation at 20), the State is not interested in awaiting the extinguishment of the reservation affecting those unsurveyed, fractional townships revealed by the reprotractions of 1942 and 1966, the measure of the State's indemnity is set by 43 U.S.C. § 851 (1976), i.e., section for section. Where, as in the instant case, a fractional township is revealed, this measure is calculated in accordance with the pro rata rule of 43 U.S.C. § 852 (1976). State of New Mexico, 54 IBLA 159 (1933). For each new, unsurveyed, fractional township within the reservation, the State is entitled to a total of 320 acres of indemnity lands.

The State's argument calling for indemnity in an amount based upon estimated acreage figures of school sections shown on protraction diagrams is expressly rejected. As noted above, in the absence of a survey of a township, a school section is undefined and its lands are unidentified. United States v. Morrison, supra. For this same reason, the State's argument that each unsurveyed school section 36 in T. 25-1/2 S., Rs. 4 through 5 E., would have contained 594 acres had BLM performed its 1966 reprotraction properly must fail. Even assuming, arguendo, that the State is right in contending that the fifth standard parallel should have been prolonged in performing this reprotraction, the acreage of a school section cannot be determined absent a survey of the township.

With respect to those new, surveyed, fractional townships within the reservation, i.e., T. 25-1/2 S., Rs. 1 through 3 E., the State's entitlement should be in an amount equal to the acreage shown by the surveyed school section(s) or in an amount determined by the pro rata rule at the election of the State. The State's receipt of 320 acres in 1961 for each of these three surveyed, fractional townships shall not preclude it from receiving its full entitlement. Any future indemnity granted according to the provisions of this paragraph shall reflect the State's receipt of 960 acres in 1961.

C. Cascade National Forest

The map forming part of the Presidential proclamation of January 25, 1907, supra, is a 1906 Forest Service diagram compiled from GLO plats and showing the Forest Service protraction of all unsurveyed areas in the Cascade Range Forest Reserve. This 1906 protraction revealed fractional townships, Tps. 18 through 23 S., R. 5 1/2 E., each of which was greater than one-half township, and less than three-quarters township, in size. The Government numbered the sections therein in a way to show sec. 16, but not sec. 36, in place.

By Exec. Order No. 863 of June 30, 1908, the Cascade Range Forest Reserve was divided into four new forests, one of which was the Cascade National Forest. The Forest Service mapped the boundaries of the forest and reprotracted the area within the forest. Thereafter, by Presidential proclamation of June 7, 1911, 37 Stat. 1684, the boundaries of the forest were again revised. As part of the revision, the numbering of sections was changed

to show both secs. 16 and 36 in place in fractional townships Tps. 18 through 23 S., R. 5-1/2 E.

The State took indemnity for school sections lost to it in Tps. 21 through 22 S., R. 5-1/2 E., in 1910. Selections for school sections in Tps. 17 through 20, and 23 S., R. 5-1/2 E., were made in 1927. The State now seeks indemnity based on the corrected section numbering and subsequent protractions.

[3] Principles set forth above in our discussions of the Siskiyou and Umpqua National Forests are contrary to the State's contentions. For unsurveyed, fractional townships within the forest, the measure of the State's indemnity entitlement is properly calculated by the pro rata rule. State of New Mexico, 54 I.D. 159 (1933). The fact that the 1911 renumbering of sections within the forest showed secs. 16 and 36 in place does not advance the State's cause. Until a survey has been run and approved, the sections are undefined and the lands are unidentified. United States v. Morrison, *supra*. Furthermore, the State's argument, that having selected its indemnity, it is entitled to the benefit of a later protraction of the identically numbered township in calculating its entitlement is contrary to the principles set forth in State of Wyoming, *supra*. This same result would obtain even if an actual survey were conducted after the State had received its indemnity. Where, as here, the issue is not BLM's recognition of new fractional townships first revealed after a State selection, we do not find support for the State's position in its compact with the United States. In fact, the compact is silent as to fractional townships and what, if any, method should be used in computing a state's grant in such a circumstance.

The principles set forth in State of Wyoming, supra, in favor of the finality of an initial land selection are expressly affirmed.

[4] The stipulation reveals that in the course of assigning township numbers to certain fractional townships, various Federal agencies changed the assigned numbers and location of protracted fractional townships. In the process of reassigning township numbers, some of the previously protracted townships were eliminated (Stipulation at 26). The result of such changes in several instances was the State's receipt of indemnity lands for the newly numbered townships and for the since-eliminated townships. An overdraw was in this way created which BLM correctly seeks to rectify in this final adjustment. Although the factual situations differ, the principles set forth in State of Wyoming, supra, are again applicable. The State's entitlement to indemnity lands for unsurveyed, fractional townships lost to it within the forest is determined by the protraction diagram in existence at the time of selection. This protraction, not subsequent ones, should be used to determine the State's entitlement. The amount of the State's overdraw is the difference between the acreage received and its entitlement as calculated according to the pro rata rule.

D. Whitman and Umatilla National Forests

The Whitman National Forest was created from the Blue Mountain Forest Reserve between 1906 and 1916. Prior to 1916, the State received indemnity lands based on GLO determinations of lands lost to the State in the forest. A similar pattern is present in the creation of the Umatilla National Forest. The Umatilla National Forest was carved from the Blue Mountain Forest Reserve.

Indemnity lands were received by the State prior to 1916 based on GLO determinations of lands lost to the State in the forest.

In 1916, GLO conducted an audit of school indemnity transactions. In the course of this audit, a protraction was run of unsurveyed townships, disclosing three fractional townships in both the Whitman and Umatilla National Forests. These fractional townships were larger than one-half township, but did not exceed three-quarters township, in size. Using this protraction, the State's entitlement was adjusted by GLO. On the basis of its revised audit, ^{15/} BLM now claims that the 1916 audit was in error and that the State's entitlement must be determined by the pro rata rule.

The parties' use of the phrase "GLO determinations" at pages 30-31 of the Stipulation in describing the basis for the State's earlier selections suggests that the 1916 protraction of the Whitman and Umatilla National Forests was the first protraction thereof. Use of "GLO determinations" is not expressly contrary to 43 U.S.C. § 851 (1976), wherein the Secretary is assigned the duty to determine "by protraction or otherwise" the number of townships within a reservation. When in 1916, GLO's protraction of the forests revealed three, presumably new, fractional townships in each, it correctly concluded that the State was entitled to indemnity lands for these unsurveyed, fractional townships.

The stipulation offers little help in determining how GLO calculated the State's entitlement in 1916. What is clear, however, is that GLO ignored

^{15/} See State of Oregon I, supra at 259, 91 I.D. at 17 (1984).

the pro rata rule in calculating this figure. The stipulation is silent as to the existence of any surveys in the six fractional townships at issue at the time that Oregon offered them as base. If the 1916 protraction showed estimated acreage in the school section(s), such acreage, like the school section itself, is illusory until a survey is run. As set forth above in discussing the Siskiyou, Umpqua, and Cascade National Forests, the amount of indemnity due the State for an unsurveyed, fractional township within a reservation can only be calculated according to the pro rata rule. For each protracted township greater than one-half, but less than three-quarters of a township, in size, the State is entitled to a total of 960 acres. The amount of the State's overdraw is the difference between the acreage received and its entitlement as calculated according to the pro rata rule.

GLO's grant of indemnity in 1916 in excess of that authorized by the pro rata rule may be corrected by BLM's revised audit. In accordance with the principles set forth in Reid v. Mississippi, 30 L.D. 230 (1900), legal title to the aforementioned overdrawn lands passed to the State. BLM does not seek the return of these lands, but instead asks the State to substitute valid base. If the State does not do so, BLM states that further indemnity lands will not be transferred to the State. We perceive no unfairness in BLM's position. The identical position was taken in Reid v. Mississippi, supra at 237:

In the opinion of this Department, therefore, the State ought to be required to designate a new basis for the lands erroneously certified, within a time to be fixed by your office, and in default thereof account should be taken of the excess of land so erroneously certified to the State and the government protected against any loss by reason thereof in the further adjustment of the State's school grant. Delaney v. Watts et al. and Miller v. Silva (8 L.D., 480; Butler v. State of California (29 L.D., 610).

E. Tabular Summary

Part F of the stipulation contains a tabular summary of indemnity transactions involving some 19 townships. In one category of transactions are those cases in which Oregon received indemnity equal to school section acreage shown to be "in place" by the original protractions or surveys. In the second category are those cases in which Oregon received indemnity based on the acreage shown to be "in place" by the original protractions (Stipulation at 36). BLM has determined that the State has overdrawn its entitlement by 323.64 acres in the first category and by 699.17 acres in the second category.

The current acreage of secs. 16 or 36 in each of the 19 townships at issue is greater than that shown on a prior survey or protraction upon which indemnity was previously taken. The tabular summary lists no school sections whose current acreage is less than that shown on the prior survey or protraction upon which indemnity selections were based. The BLM audit determined that in the latter situation substitution of base is not required for the deficiency in acreage.

At the risk of belaboring these issues, we repeat the following points. Prior to a survey, the acreage of any section is necessarily undetermined because the section itself is undefined and the lands are unidentified. United States v. Morrison, supra. An indemnity selection in an amount equal to the acreage shown on a protracted school section is in error, and an adjustment by BLM is in order. By statute, a state selecting indemnity lands prior to the survey of a township whose school lands have been reserved for

a forest is entitled to select indemnity lands to the extent of section for section, i.e., two sections for each full township. 43 U.S.C. § 851 (1976). Where, in such a case, the protraction on which the state relies indicates that a fractional township is present, the measure of a state's entitlement, i.e., section for section, is calculated according to the pro rata rule. 43 U.S.C. § 852 (1976).

Where a fractional township has been reserved prior to the school sections therein having vested in the state and thereafter the township is surveyed before the state has selected in lieu of the school sections reserved, the state may elect to take indemnity in an amount equal to the acreage of the surveyed school sections or in an amount determined by the pro rata rule based on the acreage of the fractional township.

If the state, relying on a protraction, selects indemnity lands for reserved school sections lost to it within an unsurveyed township, any subsequent reprotraction showing acreage estimates can neither add to nor subtract from the state's entitlement. A similar result obtains when a subsequent survey indicates actual acreage figures for the school sections higher or lower than the amount originally tendered as base. Insofar as the tabular summary is concerned, where the State received acreage as indemnity for an unsurveyed fractional township in excess of the amount provided by Revised Statute 2276 for fractional townships, such excess constitutes an overdraw for which valid base must be substituted. Where, however, school sections in fractional townships offered by the State had been surveyed prior to their tender as base, the State could properly offer the acreage in the surveyed sections and its indemnity would not be limited by the pro rata formula.

On remand, BLM should make appropriate adjustments in conformity with the views expressed herein and in State of Oregon I, supra, to determine whether the State is entitled to further indemnity selections.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed in part and reversed in part and remanded for action consistent herewith.

James L. Burski
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Bruce R. Harris
Administrative Judge

